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**IN THE SUPREME COURT OF THE
UNITED STATES**

October Term, 1948

No. [REDACTED] 51

PETE DARR,

Petitioner,

VERSUS

C. P. BURFORD, Warden, Oklahoma State Penitentiary,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS, TENTH CIRCUIT
AND
BRIEF IN SUPPORT THEREOF**

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MARCH, 1949.

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PETITION FOR WRIT OF CERTIORARI

Petitioner brings his Petition for Writ of Certiorari to this Court from a judgment of the United States Circuit Court of Appeals, Tenth Circuit, Denver, Colorado, which affirmed a judgment of the United States District Court for the Eastern District of Oklahoma, dismissing a Petition

for *Habeas Corpus* without making an inquiry into petitioner's detention or want of merit and his deprivation of due process of law, as provided by the Bill of Rights of the State of Oklahoma, Article 2, Section 20, Oklahoma Constitution, and in contravention of the 5th and 14th Amendments to the Constitution of the United States; but affirmed the judgment of the United States District Court for the sole and only reason that petitioner had not exhausted his state remedies.

Majority opinion by two Circuit Judges, affirming, and Chief Judge dissenting, which expressed the views that the trial court failed to consider Darr's petition for the writ on its merits, which writ was discharged on April 22, 1948. Supporting said dissenting opinion, Chief Judge quotes *Wade v. Mayo*, 334 U.S. 672, which opinion came down June 14, 1948, and is in part, as follows:

"That failure to seek review of the decision of the highest court of the state by writ of *certiorari*, such failure is a relevant consideration for the federal court in determining whether to entertain the subsequent application for a writ of *habeas corpus*, but not an absolute bar to the entertainment of such application by Federal court; and that it is the right and duty of the Federal court to weigh the failure to seek *certiorari* against any miscarriage of justice that might result from a failure to grant relief."

Powell v. Alabama,
287 U.S. 45;

Whitaker v. Johnson,
85 Fed. (2d) _____;

Ex parte Hawk,
321 U.S. 114-17;

Tony Marino v. Joseph E. Ragen,
68 Sup. Ct. 240)

Your petitioner, Pete Darr, therefore, prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals, Tenth Circuit, to review a judgment of that court entered January 31st, 1949, not officially reported at this date.

A Certified Transcript of the Record in this case, including the proceedings in the United States Circuit Court of Appeals, Tenth Circuit, is furnished herewith, in accordance with the rules of this Court.

JURISDICTION

The opinion of the United States Circuit Court of Appeals was filed January 31, 1949. Jurisdiction of the court to issue the writ applied for is invoked under Title 28, U.S.C.A. 453. And because a substantial Federal question as to restraint without due process of law under the 14th Amendment [*Hawk v. Olson*, 324 U.S. 839], all of which was denied petitioner.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

Petitioner was charged by two separate and distinct informations with robbery with firearms, issued out of the District Court of Lincoln County, Oklahoma. On January 9, 1931, petitioner, who had previously waived his preliminary hearing, was brought to Chandler, Oklahoma, from the State Penitentiary at McAlester, Oklahoma, and placed in jail and held incommunicado until the morning of January 13, on which date the two said cases were set for trial; that on said date, petitioner made application to the District

Court for a continuance in order to prepare for trial, subpoena witnesses, and that he had just been informed his counsel would not appear for him in the trial, and that other counsel had just been assigned to him and asked for time to prepare his defense; that he had no funds to employ counsel, or to subpoena witnesses on account of his incarceration in the state penitentiary (Tr. 9-10).

Petitioner alleges that on January 13, 1931, the court found that he was without counsel and without funds to employ counsel, and on said date appointed counsel to defend him, and continued the case until the following morning. With those conditions existing, petitioner was forced to trial wholly unprepared, and confronted with a hostile atmosphere, and with 34 witnesses subpoenaed to testify against him in the first case, and 19 in the second case, and not a single witness in behalf of petitioner. We contend that petitioner was convicted in violation of his constitutional rights contained in the Bill of Rights of the State of Oklahoma, Article 2, Section 20, in that petitioner was not furnished with a list of witnesses, together with their postoffice addresses to be used in chief against him, although petitioner requested the county attorney to furnish him with said list of witnesses. Petitioner further alleges that the postoffice addresses of witnesses were not endorsed on either of the two informations filed against him.

We further contend that petitioner was convicted in contravention of the 5th and 14th Amendments of the Constitution of the United States. In support of our contention, the record discloses that petitioner was tried on

January 14th, and jury empanelled on said date; that he had no counsel of his own choosing, and his appointed counsel had no time to prepare for trial; that the jury returned a verdict of guilty and assessed punishment at confinement in the penitentiary for a period of 40 years at hard labor, and the judge set January 16, for date of sentence, but petitioner was sentenced on January 15 (See Record of Judgment, p. 16). Denial of effective assistance of counsel in prosecution in state court violates due process.

U.S.C.A., Const. Amend. 14.

The offense charged was a serious one. The maximum punishment therefor was death or imprisonment at hard labor in the state penitentiary. See 21 O. S. 1941, Sec. 801. The defendant needs counsel and counsel needs time.

Tompkins v. Missouri,
323 U.S. 485;

Palko v. Connecticut,
302 U.S. 327;

Hawk v. Olson,
321 U.S. 144;

Powell v. Alabama,
287 U.S. 45;

Moore v. Dempsey,
261 U.S. 86;

Baker v. State,
130 Pac. 820;

Commonwealth v. O'Keefe,
148 Atl. 75;

Glasser v. United States,
315 U.S. 60.

When the life of a man hangs in the balance, he is entitled to the fullest measure of due process of law, and

the aid of counsel at every step of the proceedings to guide him along the complicated labyrinths of the law.

Thereafter, and on January 14, 1931, petitioner was brought before the same court at Chandler, Oklahoma, on the second charge of robbery with firearms, and jury empanelled to try said cause. The State introduced two witnesses and petitioner could introduce none.

Petitioner was held in jail at Chandler, Oklahoma, awaiting the verdict, and on the following morning the County Attorney visited him, and suggested that petitioner plead guilty, and petitioner refused. The County Attorney then informed petitioner if he would enter a plea of guilty, he could obtain for him a sentence of only ten years to run concurrently with the former sentence of 40 years. Petitioner still refused to plead guilty. Whereupon the County Attorney informed him if he did not plead guilty to said charge he stood to get the electric chair on account of the bitter feeling against him; and further informed petitioner that the court or the jury could, upon conviction of the crime with which he was charged, assess the death penalty against him. This fact was testified to by petitioner on February 8, 1948, before Honorable Eugene Rice, U. S. District Judge, and no denial was made of this allegation (Tr. 22-23). This startling disclosure of the law, under which petitioner was being tried, horrified your unlearned petitioner, and deprived him of his reason and judgment, and left him subservient to the suggestions of the County Attorney, and while laboring under such feeling of terror that he might receive the death sentence, and relying on the

promises of the County Attorney, he agreed to enter a plea of guilty. Petitioner was thus coerced into pleading guilty to the last named charge and before the jury returned a verdict. Petitioner not only was coerced into pleading guilty under fear of receiving the death penalty but was coerced into pleading guilty by the alleged community hostility against him.

Petitioner appeared before the court on the same date and entered his involuntary plea of guilty to the charge; that after being informed by the court, that he would sentence him to a term of 40 years at hard labor to run consecutively to the 40 years already imposed upon him, petitioner attempted to withdraw his guilty plea; but the court denied said plea and immediately sentenced petitioner to a term of 40 years in the State Penitentiary at McAlester, Oklahoma, on the last named charge to run consecutively as to the first sentence of 40 years already imposed upon him.

Kercheval v. United States,
274 U.S. 220;

Jack Walker v. James A. Johnston,
85 L. ed. 830, 312 U.S. 275;

Glasser v. United States,
315 U.S. 60;

Smith v. O'Grady,
312 U.S. 329;

State v. Brown,
266 Pac. (2d) 475;

Williams v. Kaiser,
323 U. S. 471;

Moore v. Dempsey,
261 U.S. 86;

Von Molke v. Gillies,
332 U.S. 708;

De Meerleer v. Michigan,
329 U.S. 663.

We urge that the case of *Von Molke v. Gillies* presents a serious constitutional question on behalf of petitioner Darr, on his plea of guilty.

The Criminal Court of Appeals denied the original writ solely on the basis of certified copies made by the clerk, which were never authenticated by the trial judge. No transcript was ever made of the proceedings of the trial.

Petitioner had no funds with which to make an appeal from his conviction and no friends to aid him; he was rushed to the penitentiary and had no opportunity to appeal.

Waley v. Johnston,
316 U.S. 101;

Johnson v. Zerbst,
304 U.S. 458.

QUESTIONS PRESENTED

1. May the courts below, in view of all the decisions presented by petitioner in support of his contention that he was deprived of due process of law, contrary to the Bill of Rights as revealed by the record, and in contravention of the 5th and 14th Amendments to the Constitution of the United States, refuse to consider his petition upon its merits?

2. Is denial of petitioner's writ under all the facts pleaded and supported by the Record, in accord with due process of law?

3. Shall petitioner be denied relief, and doomed to spend the remainder of his life behind the dark prison walls on account of a mere technical suggestion, which appears to have been overruled by this Honorable Court?

Rice v. Olson.
324 U.S. 786;

Wade v. Mayo.
334 U.S. 672.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Your petitioner believes that a writ of *certiorari* should be granted in this case for the reason that petitioner was denied the rights afforded him under the Constitution and laws of the State of Oklahoma, contained in the Bill of Rights, Art. 2, Sec. 20, Oklahoma Constitution, and the 5th and 14th Amendments of the Constitution of the United States.

The majority opinion of the court below appears to be in conflict with a recent decision of this Court, *Wade v. Mayo*, 334 U.S. 672, and many other opinions heretofore rendered and herein referred to when a Federal right has been claimed in the courts, it is, we believe, the province of this Court to inquire into the very truth and substance of his detention.

Wade v. Mayo:
334 U.S. 672;

Lewis Lutz v. Joseph E. Ragen,
325 U.S. 768:

Commonwealth v. O'Keefe,
148 Atl. 75;

Frank v. Mangum,
237 U.S. 309;

Johnson v. Zerbst,
304 U.S. 458;

State ex rel. Tucker v. Davis,
130 Pac. 962;

Ex parte Stinnett,
110 Pac. (2d) 310;

Norris v. Alabama,
294 U.S. 587;

Powell v. Alabama,
287 U.S. 45.

PRAYER

WHEREFORE, your petitioner respectfully prays that this Court as the final arbiter of questions arising under the 5th and 14th Amendments of the Constitution of the United States, issue a writ of *certiorari* to the United States Circuit Court of Appeals, Tenth Circuit, to the end that this cause may be reviewed and determined by this Court, according to law, and that your petitioner may have such other and further relief as this Court may deem just and proper.

By his attorneys,

JOHN B. OGDEN,
Colcord Building.

JOHN J. CARNEY,
516 Fidelity Bldg.,
Oklahoma City, Oklahoma.

MARCH _____, 1949.

CERTIFICATE

I, the undersigned counsel for petitioner, hereby certify that I have examined the foregoing petition for *certiorari*, and that it is my opinion the same is well founded and entitled to the favorable consideration of this Court.

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Attorney for Petitioner.

MARCH, 1949.

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

OPINIONS OF THE COURTS BELOW

The United States District Court for the Eastern District of Oklahoma, without expressing any opinion upon the merits of petitioner's contentions, denied relief, and discharged the writ, for the sole reason he had failed to exhaust his state remedies. Dated April 22, 1948.

From which order an appeal was taken to the United States Circuit Court of Appeals, Tenth Circuit, Denver, Colorado, on May 1, 1948. Judgment is found at Tr. 16.

The opinion of the United States Circuit Court of Appeals, Tenth Circuit, has not yet been officially reported, but may be found at Tr. 45-53, inclusive.

JURISDICTION

The judgment of the United States District Court for the Eastern District of Oklahoma, was rendered on April 22, 1948 (Tr. 45-53 inc.).

The judgment of the United States Circuit Court of Appeals, Tenth Circuit, was entered January 31, 1949. This Court's jurisdiction is found in 28 U.S.C.A. 453.

STATEMENT OF THE CASE

The statement of facts as recited in the preceding petition under the heading "Summary Statement of the Matters Involved" is sufficient understanding of the grounds urged

for the allowance of the writ, and that statement of facts is hereby adopted and made a part of this brief.

SPECIFICATIONS OF ERROR

The statements in the petition of the questions presented and the reasons relied on for the allowance of the writ show the errors intended to be urged. In the interest of brevity they will not be repeated here.

ARGUMENT

Under the caption, "Statement of Matters Involved," a brief synopsis is given of the salient points of petitioner's trial and conviction, and his plea of guilty, which the undisputed facts reveal was under duress, and in which we cite many opinions in support of our contention that both judgments were contrary to the Bill of Rights, of the Oklahoma Constitution, and in contravention of the 5th and 14th Amendments of the Constitution of the United States, and that said judgments were therefore void, for want of due process of law.

Our Constitution and Bill of Rights call for a careful and sympathetic observance of due process of law that is guaranteed to all accused persons; and that observance was not afforded petitioner.

In the dissenting opinion of the Chief Judge of the United States Circuit Court of Appeals, Tenth Circuit, we find this opinion provides a suggestive answer to the contention that petitioner failed to seek relief in the Supreme

Court of the United States by certiorari; supported by a very recent opinion, *Wade v. Mayo*; 334 U.S. 672.

And in further support of the objection to the essential question raised in the courts below, we quote the case entitled:

Herman Metz Waley v. Jas. A. Johnston,
316 U.S. 101, and

further a recent case entitled:

Tony Marino v. Joseph E. Ragen,
68 Sup. Ct. 240.

This case, we believe is not only applicable to the State of Illinois, but decides fundamental principles of law in petitioner's case before this Court.

In the second case the decision to plead guilty was made through coercion and promises of leniency, and was therefore, involuntary. It would be a strain on credulity to believe that petitioner would voluntarily plead guilty while the jury was still deliberating, for to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing; a decision which forecloses any possibility of establishing innocence. The Record fails to show that petitioner had any effective assistance from his appointed counsel in his hour of distress and peril (Tr. 28-29).

Petitioner was not informed by either the County Attorney, or his appointed counsel that it was not within the province of the trial judge to accept any statements, or promises of leniency made by the County Attorney to the

petitioner, and the Record fails to reveal he was apprised of the consequences of his plea by the trial judge.

The undisputed facts herein reveal that petitioner was not convicted in accordance with "due process of law," of the charge of Robbery with Firearms, when he was sentenced to serve 40 years in the State Penitentiary at hard labor, and on an involuntary plea of guilty, for which he received an additional sentence of 40 years to run consecutively with the first sentence.

We therefore contend that both sentences are and were void.

CONCLUSION

Certified copies of Informations under which petitioner was tried and convicted were before the courts below. In said Informations Pete Darr, Herman Chevreux, Les Cargo and Ted Johnson were charged *jointly* with Robbery with Firearms.

Under said Informations Pete Darr received a sentence of 80 years at hard labor; Herman Chevreux received only a light sentence, and was released many years ago, along with Ted Johnson; Les Cargo was killed on the streets of Oklahoma City, Oklahoma, before being served with a warrant.

We present the undisputed facts to this Honorable Court for the express and only purpose of further showing that this uneducated and bewildered petitioner appearing in a hostile atmosphere, without witnesses in his behalf, was

not accorded a fair and impartial trial at any stage of the proceedings.

It is therefore respectfully urged that this case is one calling for the exercise by this Court of its supervisory powers and that a writ of *certiorari* should be granted.

Respectfully submitted,

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MARCH, 1949.